No. 03-112

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM P. SCHLENK,

Petitioner,

v.

FORD MOTOR CREDIT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under the federal Consumer Leasing Act and related administrative regulations, a lessor must capitalize any fee or charge or, as the Sixth Circuit concluded, may instead account for a fee or charge by including it in the disclosed "rent charge," which need not be itemized.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The correct name of Respondent is Ford Motor Credit Company (not "Corporation," as stated in the petition). Ford Motor Credit Company is a subsidiary of Ford Motor Company, which owns more than ten percent of its stock. No other publicly held company owns ten percent or more of the stock of Respondent.

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PROVISIONS INVOLVED

In addition to the provisions identified by Petitioner, Respondent identifies the following regulations promulgated by the Federal Reserve Board to implement the terms of the Truth-in-Lending Act:

§ 213.2 Definitions.

For the purpose of this part the following definitions apply:

* * *

(f) *Gross capitalized cost* means the amount agreed upon by the lessor and the lessee as the value of the leased property and any items that are capitalized or amortized during the lease term, including but not limited to taxes, insurance, service agreements, and any outstanding prior credit or lease balance. *Capitalized cost reduction* means the total amount of any rebate, cash payment, net trade-in allowance, and noncash credit that reduces the gross capitalized cost. The *adjusted capitalized cost* equals the gross capitalized cost less the capitalized cost reduction, and is the amount used by the lessor in calculating the base periodic payment.

§ 213.4 Content of disclosures.

For any consumer lease subject to this part, the lessor shall disclose the following information, as applicable:

* * *

(f) *Payment calculation.* In a motor-vehicle lease, a mathematical progression of how the scheduled periodic payment is derived, in a format substantially similar to the applicable model form in appendix A of this part, which shall contain the following:

* * *

(5) *Depreciation and any amortized amounts.* The depreciation and any amortized amounts, which is the difference between the adjusted capitalized cost and the residual value, with a description such as "the amount charged for the vehicle's decline in value through normal use and for any other items paid over the lease term."

* * *

(7) *Total of base periodic payments.* The total of base periodic payments with a description such as "depreciation and any amortized amounts plus the rent charge."

STATEMENT OF THE CASE

In an opinion issued on October 25, 2002, the United States Court of Appeals for the Sixth Circuit affirmed the district court's dismissal, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, of Petitioner William P. Schlenk's complaint. *Schlenk v. Ford Motor Credit Co.*, 308 F.3d 619 (6th Cir. 2002). His petition for rehearing was denied by order dated February 11, 2003. (Pet. App. at 19a.) In his petition for a writ of certiorari, Schlenk argues that his claim under the Consumer Leasing Act, 15 U.S.C. §§ 1667 *et seq.* (the "CLA") should not have been dismissed. The CLA is part of the larger Truth-in-Lending Act, 15 U.S.C. §§ 1601 *et seq.* The CLA is supplemented by the Federal Reserve Board's Regulation M, 12 C.F.R. § 213, and by the Board's Official Staff Commentary on Regulation M.

Schlenk entered into a 24-month lease of a new Ford truck on August 7, 1998, with a dealer, Bill Collins Ford, Inc. The lease was assigned by the dealer to Respondent Ford Motor Credit Company ("Ford Credit"). (Pet. App. at 2a.) In accordance with Regulation M, the front page of the lease specified how the monthly payment was calculated, beginning with the gross capitalized cost. (*See* Resp't App.)

The "gross capitalized cost," the starting figure for computation[1] of the monthly payment, is itemized on the

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1. The federally prescribed formula set out in Schlenk's lease begins with the agreed capitalized cost (a negotiable figure, consisting mainly of the value of the vehicle) and subtracts from that figure any down payments or credits, resulting in a net or adjusted capitalized cost. From this net figure is subtracted the agreed "residual value" (Cont'd)

reverse side of the lease. (*Id.*) The itemization shows that the gross capitalized cost in Schlenk's lease consisted of the agreed upon price of the vehicle ($22,184.00) plus the cost of "Theft Guard" ($95.00), totaling $22,279.00. (*Id.*) The itemization shows that no acquisition fee was included in the gross capitalized cost. Schlenk did not and could not allege that this disclosure was inaccurate: no acquisition fee was capitalized in his lease. While Schlenk contends in this Court, as he did below, that Ford Credit "represent[s] . . . that it does not charge any acquisition fee. . . ," (Pet. at 10), in fact, the lease only stated that no such fee was *capitalized,* an important distinction. Schlenk argues that Ford Credit's administrative fee should have been capitalized even though capitalizing that fee would produce economically detrimental results for many consumers, and no economic benefit for anyone.

The parties agree on three points: (1) Ford Credit's administrative fee[2] was included within its disclosed "rent

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(Cont'd)

of the vehicle when the lease ends. The resulting difference represents the depreciation of the vehicle during the lease term, *i.e.*, the decline in value of the vehicle during the lease. Next, to derive the monthly payment, the depreciation figure is added to the lessor's "rent charge," which includes the lessor's cost of funds and administration as well as its profit. Added together, the depreciation and the rent charge produce the total of monthly payments, which is divided by the lease term (here 24 months) to produce the base monthly payment. Other charges included in the monthly payment (here a monthly charge of $17.03 for sales tax) are added to the base monthly payment to reach the total monthly payment. (*See* Resp't App.)

2. The fee is calculated as one-ninth of one percent of the adjusted capitalized cost. (Pet. App. at 2a.) Schlenk contends that Ford Credit's administrative fee should be characterized as an acquisition fee.

charge" in Schlenk's lease, (*id.* at 12); (2) the administrative fee was not added to or included in the capitalized cost in Schlenk's lease; and (3) under Regulation M, the "rent charge" disclosure need not be itemized, *i.e.*, the components of the rent charge need not be separately disclosed. (*Id.* at 11.) In the Sixth Circuit, Schlenk's theory was that Ford Credit's inclusion of an administrative fee as an element of its "rent charge" either had to be separately disclosed somehow or was prohibited by Regulation M, because all such fees had to be included in the capitalized cost. The Sixth Circuit and the district court rejected this claim and Schlenk's other arguments.

In his petition to this Court, Schlenk focuses exclusively on a contention that Ford Credit's administrative fee must be capitalized and separately disclosed in the itemization of the gross capitalized cost.

REASONS FOR DENYING THE PETITION

A. *Introduction and Summary*

The premise for Schlenk's petition for a writ of certiorari is that the Sixth Circuit failed to afford so-called *Chevron* deference to the Federal Reserve Board's own interpretation of Regulation M and related Official Staff Commentary. But this argument cannot withstand even superficial examination. The Board has not interpreted its regulation as Schlenk claims it did; he relies entirely on a snippet from the "Regulatory Flexibility Analysis," not published in the Code of Federal Regulations and not a part of the Board's Official Staff Commentary, which accompanied a revision of Regulation M, and even that snippet plainly does not help his cause. Schlenk's pitch for a striking new substantive requirement

for leases—that all acquisition fees must be capitalized—is inconsistent with and wholly unsupported by the actual texts of Regulation M and the Official Staff Commentary, and was properly rejected by the Sixth Circuit. But the main point, for purposes of Schlenk's petition to this Court, is that the Sixth Circuit never questioned the *Chevron* deference rule;[3] Schlenk's asserted grievance is only in the supposed misapplication of that unchallenged rule to this case. And Schlenk identifies no conflict among the circuit courts of appeals (or among any courts) with respect to any issue in this case; nor any conflict between the Sixth Circuit's ruling and this Court's precedents; nor any other reason for further review by this Court of the lower courts' uniform rejection of his claims.

B. *There Is No Conflict Among Other Courts or With This Court's Precedents, and No Important Federal Issue Is Presented*

Schlenk's petition does not approach the compelling showing necessary for selection for review by this Court. Schlenk cites no conflict between the Sixth Circuit's decision and any other court of appeals's decision, and there is none. In fact, there is no conflict between the Sixth Circuit's decision and any other published decision by *any* court. The only analogous district court decision, which involved a claim that Ford Credit's administrative fee should be itemized under state law, rejected that claim, compatibly with the Sixth Circuit's analysis here. *See Mitchell v. Ford Motor*

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3. In fact, the Sixth Circuit did not discuss the *Chevron* standard in its decision not because it ignored the standard, but because Schlenk did not assert the argument he is now raising until his petition for rehearing before that court.

Credit Co., 68 F. Supp. 2d 1315, 1320 (N.D. Ga. 1998) ("The apportionment of part of the lease charge to an acquisition fee is not material.").

Schlenk argues that a writ of certiorari should be granted to review the proper degree of deference to agency regulations under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But the *Chevron* rule was not challenged by the Sixth Circuit, and Schlenk's grievance involves, at best, a "misapplication of a properly stated rule of law," among the weakest classes of candidates for invocation of the Court's jurisdiction. *See* Sup. Ct. R. 10. And Schlenk's case is a remarkably poor specimen from even that class, since his claims presented no occasion for consideration of the degree of deference to an administrative agency. The Sixth Circuit did not discuss the issue, and there was nothing in Schlenk's arguments that gave the court a reason to do so. Schlenk presented no legitimate potential agency deference issue. He did not rely on a published regulation, and the Federal Register excerpt—not a regulation—on which he did rely unmistakably did not support his claim. The focus of his appeal, in fact, was on other arguments. Finally, according to Schlenk's allegations, the practices in issue in this case involve only a single company. A poorer candidate for certiorari is difficult to imagine.

In an attempt to bolster his claim that this case is appropriate for review, Schlenk contends that his case is analogous to *Pfennig v. Household Credit Services, Inc.*, 295 F.3d 522 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 2639 (June 27, 2003) (No. 02-857). In *Pfennig*, the Sixth Circuit declined to defer to a Federal Reserve Board regulation on the ground that the Truth-in-Lending Act provision at issue

was unambiguous and the Board's interpretation of the provision was inconsistent with the clear language of the provision. *Id.* at 530. But unlike *Pfennig*, here the Sixth Circuit was never called upon to exercise *Chevron* deference because there was no regulation interpreting the statute consistently with Schlenk's various arguments.

C. *The Sixth Circuit's Decision Was Manifestly Correct*

1. *Regulation M Does Not Require the Administrative Fee to be Capitalized*

The sole pretext for this case was the fortuity that Ford Credit, for its own purposes, referred to a component of its disclosed, aggregate "rent charge" as a "fee," specifically as an "administrative fee." Schlenk's lease disclosed all of Ford Credit's fees and charges in one lump sum, in the line item on the lease where it was most logically reported—in the "rent charge." In that figure, anyone could see what Ford Credit was getting out of the monthly lease payments.

The Sixth Circuit correctly held that "neither the CLA nor Regulation M requires [Ford Credit] to disclose the administrative fees and itemize the rent charge." (Pet. App. at 5a.) In his petition to this Court, Schlenk argues that the capitalized cost *must* include anything called an acquisition or administrative fee that is not paid up-front, when the lease is signed. Since the gross capitalized cost is the subject of an itemized disclosure, he argues, such fees must be itemized.[4] Yet Schlenk supports this argument exclusively

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4. Itemization of the gross capitalized cost is required by Regulation M, in section 213.4(f)(1), if an itemization is requested

(Cont'd)

with a snippet from the 1996 "Regulatory Flexibility Analysis" included in the Federal Register's publication of changes to Regulation M, which was not published in the Code of Federal Regulations—and is not a part of the Board's Official Staff Commentary on Regulation M. 61 Fed. Reg. at 52,269, 52,274. The remarkable thinness of this claimed support is surprising enough, but the real surprise comes upon reading the language he relies on (*see* Pet. at 8-9), which in no way supports his argument that all acquisition fees *must* be capitalized. This language indicates that acquisition fees *may* be capitalized, a point on which the parties agree. The degree of judicial deference to this language thus is a phony issue. The language does not purport to mandate capitalization of all acquisition fees.

If there were any doubt of this, a review of Regulation M and its Official Staff Commentary would easily settle the question. Neither Regulation M nor the commentary anywhere requires that all administrative or acquisition fees

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(Cont'd)

by the lessee. (Ford Credit leases provide the itemization as a matter of course, as the regulation permits.) Schlenk's lease includes such an itemization, and it correctly shows that no "acquisition fee" was included in the capitalized cost. Only the price of the vehicle and an anti-theft accessory is so included. Where provided, the itemization of the capitalized cost allows a lessee to learn what items in addition to the price of the vehicle are being amortized, *i.e.*, paid for, over the lease's term. A lessee might otherwise assume, incorrectly, that the capitalized "cost" represents only the vehicle's price, where in fact it may include insurance, service contracts, and other items, including a pass-through to the lessee of an acquisition fee paid by the originating dealer to the party that acquires the lease by assignment from the dealer. By entering into the lease, the lessee "buys" these items, and agrees to retire the purchase obligation in deferred monthly payments made over the lease term.

be *capitalized*, *i.e.*, included in the gross capitalized cost—and any such requirement would be disadvantageous for the typical consumer, who is better off if such fees are included (as Ford Credit included them) in the rent charge. The regulation defines the gross capitalized cost (*i.e.*, the capitalized cost before deduction of down payments) to include the price of the vehicle and the price of any items capitalized or amortized during the lease term, as defined in section 213.2(f) of Regulation M:

> (f) *Gross capitalized cost* means the amount agreed upon by the lessor and the lessee as the value of the leased property and any items that are capitalized or amortized during the lease term, including but not limited to taxes, insurance, service agreements, and any outstanding prior credit or lease balance.

12 C.F.R. § 213.2(f).[5] The definition obviously includes no reference to acquisition or administrative fees. The accompanying Official Staff Commentary does not elaborate on this definition. The commentary does address disclosure of the gross capitalized cost in the payment calculation, but still makes no mention of acquisition or other fees. *See* 12 C.F.R. § 213, Supp. I at 415. Thus, neither the regulation's text nor the Board's Official Staff Commentary in any way supports Schlenk's argument that all acquisition fees must be capitalized—alone, a fatal blow. It is impossibly farfetched to ascribe to the Board an intention to effect so major a policy change without plain language calling for it. The regulation's text and the accompanying Official Staff

5. There have been slight changes to this definition since its promulgation, but none relevant here.

Commentary contain not even a hint of the requirement Schlenk advocates.

Notwithstanding the regulation's silence, the parties do agree that, under Regulation M, the capitalized cost is to include any items that are capitalized or amortized during the lease term, and that acquisition fees *may* be added to the capitalized cost, even though that is not specified in the regulation's definition. (Pet. at 12-13.) The Federal Register snippet quoted by Schlenk suggests as much. But permitting acquisition fees to be capitalized is a far cry from *mandating* that all such fees be capitalized, a concept that finds no support anywhere in the regulation or the administrative history. There is no policy reason why the Board would adopt such a rule. To capitalize or amortize an acquisition fee, moreover, is economically detrimental to the lessee if the lessee terminates the lease early or defaults. Under Schlenk's lease, for example, if he terminated early or defaulted, he would be obligated to pay the unpaid adjusted capitalized cost (less the value of the vehicle).[6] (Resp't App.) In other words, terminate early or not, Schlenk still would be required to pay the full purchase price of all capitalized amounts.

In contrast, Schlenk did not become obligated to pay the unearned rent charge if he terminated early or defaulted.

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6. Specifically, the definition of "Unpaid Adjusted Capitalized Cost" in paragraph 9 of the lease provides that it is calculated by reducing the Adjusted Capitalized Cost each month by the difference between the Base Monthly Payment and the part of the Rent Charges earned in that month on an actuarial [pro rata] basis. (Resp't App.) The lessee, in other words, basically must pay the remaining capitalized cost minus the residual value, but not the remaining rent charge.

If he terminated early or defaulted before lease end, he would not be liable for any of the future rent charge for the remainder of the lease term. The rent charge, including its component administrative fee, was a current obligation, which Schlenk paid as it came due monthly, akin to interest.

In summary, there is no regulatory requirement or interpretation supporting the notion that Ford Credit was required to include its administrative fee in the capitalized cost in Schlenk's lease.

2. *The Sixth Circuit Properly Interpreted Regulation M and the CLA*

Schlenk also complains that the Sixth Circuit neglected to hew to the CLA's "core purpose" by requiring disclosure of what he describes as "full and complete information." (Pet. at 19-20.) More specifically, he argues that the Sixth Circuit erroneously concluded that disclosure of "bottom-line prices" was sufficient to satisfy the law. (*Id.* at 20.) But this plainly was not the Sixth Circuit's holding or its approach to the statute. A threshold problem with this argument is that Schlenk *concedes* that the "rent charge" is not required to be itemized. (*Id.* at 11.) So the supposed "bottom-line price" that Schlenk now says needs to be "unpacked" he earlier conceded did not need to be unpacked. That incongruity aside, the "rent charge" quite obviously is not a bottom-line figure—it is a component of the mathematical progression explaining how the monthly payment is calculated. It is inconceivable that any further breakdown would be useful to any consumer. And, conceptually, Schlenk is wrong that the CLA mandates endless disclosure. In fact, the required disclosures have been

carefully calibrated by the Board, trying to achieve a balance between informative disclosure and "information overload," as this Court has explained:

> *Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between "competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload.]" S.Rep. 96-73, p. 3 (1979) (accompanying S. 108, Truth in Lending Simplification and Reform Act). . . . And striking the appropriate balance is an empirical process that entails investigation into consumer psychology and that presupposes broad experience with credit practices.

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568-69 (1980) (some citations omitted). Even the "Regulatory Flexibility Analysis" cited by Schlenk makes the same point:

> The goal of a disclosure scheme should be to make available sufficient information that consumers can make good decisions, not to require every disclosure that might possibly be useful to someone, sometime, for some purpose. No disclosure scheme, it seems, will ever be able to insure that all consumers understand everything or that they never have to read contracts or make any calculations for themselves.

61 Fed. Reg. at 52,273. The Sixth Circuit correctly applied the CLA and the pertinent regulations. There is no reason for further review.

CONCLUSION

Schlenk's petition for a writ of certiorari is meritless and should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS FROM WILLIAM P. SCHLENK'S LEASE

Excerpts from William P. Schlenk's Lease

From front side of page 1 of Lease:

Your monthly payment is determined as shown below:

Gross capitalized cost. The agreed upon value of the Vehicle ($ 22184.00) and any items You pay over the lease term (such as service contracts, insurance, and any outstanding prior credit or lease balance) (Itemized below).**		$ 22279.00
Capitalized cost reduction. The amount of any net trade-in allowance, rebate, non-cash credit, or cash that You pay that reduces the gross capitalized cost	–	2350.00
Adjusted capitalized cost. The amount used in calculating Your base monthly payment	=	19929.00
Residual value. The value of the Vehicle at the end of the lease used in calculating Your base monthly payment	–	16679.30
Depreciation and any amortized amounts. The amounts charged for the Vehicle's decline in value through normal use and for other items paid over the lease term	=	3249.70
Rent charge. The amount charged in addition to the depreciation and any amortized amounts	+	3562.22
Total of base monthly payments. The depreciation and any amortized amounts plus the rent charge	=	6811.92
Lease term. The number of months in Your lease.	÷	24
Base monthly payment.	=	283.83
Monthly sales / use tax	+	17.03
_____	+	N/A
_____	+	N/A
Total monthly payment		$ 300.86

From back side of page 1 of Lease:

**Itemization of Gross Capitalized Cost

Agreed Upon Value of the Vehicle $ 22184.00	Sales/Use Tax and Other Applicable Taxes +$ N/A	Title Fees +$ N/A	License and Registration Fees +$ N/A	Extended Warranty and Service Contract +$ N/A	Lessor Services +$ N/A
Acquisition Fee +$ N/A	Documentation Fee +$ N/A	Life Insurance Premium +$ N/A/	Disability Insurance Premium +$ N/A	Theft Guard +$ 95.00	Total Gross Capitalized Cost =$ 22279.00

From front side of page 2 of Lease:

9. VOLUNTARY EARLY TERMINATION. You may terminate this lease early, if You are not in default, by returning the Vehicle to Lessor and paying the following: (a) an early termination fee of **$200, plus** (b) the difference, if any, between the Unpaid Adjusted Capitalized Cost and the Vehicle's Fair Market Wholesale Value, **plus** (C) all other amounts then due under this lease.

Unpaid Adjusted Capitalized Cost is reduced on each payment due date. It is calculated by reducing the Adjusted Capitalized Cost each month by the difference between the Base Monthly Payment and the part of the Rent Charges earned in that month on an **actuarial basis**.

Fair Market Wholesale Value, at Your option, will be: (a) an amount agreed to by You and the Lessor, or (b) the value which could be realized at the wholesale sale of the Vehicle, as determined by a professional appraisal obtained by You at Your expense within 10 days from an independent third party agreeable to Ford Credit, or (c) if not established by agreement or appraisal, the net amount received by Ford Credit upon the sale of the Vehicle at wholesale.